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BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

Petition of TracFone Wireless, Inc., for Designation as an Eligible
Telecommunications Carrier in the State of Wisconsin

9385-TI-100

FINAL DECISION

This is the Final Decision in the investigation to determine whether to designate TracFone Wireless, Inc. (TracFone), as an Eligible Telecommunications Carrier (ETC), pursuant to 47 U.S.C. § 214(e)(2) and Wis. Admin. Code § PSC 160.13. Designation as an ETC makes a provider eligible to receive Federal Universal Service Fund (USF) monies.

Introduction

TracFone Wireless, Inc. (TracFone), filed a petition for designation as an ETC on September 18, 2008. The Commission issued a Notice of Investigation and Request for Comments on October 30, 2008, with comments due on or before November 20, 2008. No comments were filed. TracFone's ETC request presents issues not previously seen in ETC dockets. Consequently, Commission staff made several information requests to the applicant, both while the Notice was pending and afterward. Staff also had numerous contacts with the Universal Service Administrative Company (USAC), the administrator of the Federal USF, and the Federal Communications Commission (FCC) regarding the applicant's compliance with FCC rules on Lifeline. In addition, staff contacted other state commissions to inquire about their experiences with TracFone's Lifeline program.

The Commission discussed this matter at its April 16, 2009, open meeting. A list of parties to the docket is shown in Appendix A.

Findings of Fact

1. TracFone is a wireless reseller and owns no facilities in Wisconsin. It serves statewide.

2. TracFone has committed to providing service to all requesting customers, and to advertising the availability of its service, throughout the exchanges in which it provides service, as required under 47 U.S.C. § 214(e) and Wis. Admin. Code § PSC 160.13.

3. TracFone has committed to providing service which meets the requirements set forth in Wis. Admin. Code § PSC 160.13, including the essential service definition set forth in Wis. Admin. Code § PSC 160.03, with the exception of the requirement that an ETC provide a pay phone in each municipality, as set forth in Wis. Admin. Code § PSC 160.13(1)(d), the requirement to charge a minimum monthly fee, as set forth in Wis. Admin. Code § PSC 160.062(2)(c), and the requirement to provide a monetary discount. TracFone has requested waivers of those requirements.

4. It is reasonable and in the public interest to grant ETC status to TracFone in the areas indicated in its application, conditioned on TracFone providing a plan acceptable to the Administrator of the Telecommunications Division for monitoring use of its service by Lifeline customers and preventing Lifeline benefits from being paid for handsets no longer in use.

5. The pendency of a rule change and the redundancy of any pay phones that TracFone would provide create an unusual circumstance. It is reasonable to adopt a requirement concerning pay phones other than the one set forth in Wis. Admin. Code § PSC 160.13(1)(d).

It is reasonable to require TracFone to work with other providers to ensure that there is at least one pay phone in each municipality.

6. TracFone's business plan and the administrative difficulty involved in having a minimum monthly charge and the standard Lifeline monthly discount, when the ETC is a prepaid provider, create an unusual circumstance that justifies adopting different requirements concerning these items.

7. It is reasonable to require TracFone to provide a monthly credit in the form of minutes, in lieu of the dollar discounts set forth in Wis. Admin. Code § PSC 160.062(2)(b).

8. It is reasonable to *not* require TracFone to charge a minimum monthly fee, as set forth in Wis. Admin. Code § PSC 160.062(2)(c).

9. It is reasonable to require providers that service the market niche TracFone intends to serve to demonstrate that adequate procedures to ensure compliance with state and federal ETC requirements are in place before granting such certification. It is also reasonable to require such providers to keep records that allow verification as to whether the procedures are being followed.

Conclusions of Law

1. The Commission has jurisdiction and authority under Wis. Stat. §§ 196.02 and 196.218; Wis. Admin. Code ch. PSC 160; 47 U.S.C. §§ 214 and 254; and other pertinent provisions of the Telecommunications Act of 1996 to make the above Findings of Fact and to issue this Final Decision.

2. The Commission has the authority to adopt different ETC requirements under Wis. Admin. Code § PSC 160.01(2)(b).

Opinion

ETC status was created by the 1996 Telecommunications Act and codified in 47 U.S.C. § 214(e)(2). Under FCC rules, 47 U.S.C. § 214(e)(2) and 47 C.F.R. § 54.201(b), state commissions are allowed to designate providers as ETCs. Designation as an ETC is required if a provider is to receive federal universal service funding. ETC designation is also required to receive funding from the state universal service High Rate Assistance Credit program.

The FCC established a set of minimum criteria that all ETCs must meet. These are codified in the federal rules. 47 U.S.C. § 214(e)(1), 47 C.F.R. § 54.101(a). The 1996 Telecommunications Act states that: “States may adopt regulations not inconsistent with the Commission’s rules to preserve and advance universal service.” 47 U.S.C. § 254(f). The United States Court of Appeals for the Fifth Circuit upheld the states’ right to impose additional conditions on ETCs in *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 418 (5th Cir. 1999).

In the year 2000, the Commission promulgated Wis. Admin. Code § PSC 160.13 to govern ETC designations and requirements in Wisconsin. Those rules established the process for ETC designation and set forth a minimum set of requirements for providers seeking ETC designation from the Commission.

In evaluating requests for ETC designation, the Commission must balance the needs of the providers, the needs of the recipients of the various universal service programs and the preservation of the programs and industry as a whole. In this specific case, it is clear from the experience of other states that TracFone’s business model is quite successful. This business model has the potential of providing access to telephone service to a possibly large market of

underserved customers in Wisconsin, but presents issues not previously seen in earlier ETC dockets. Consequently, staff made several information requests to the applicant and had numerous contacts with the USAC, the administrator of the Federal USF, and the FCC regarding the applicant's compliance with FCC rules on Lifeline. In addition, staff contacted other state commissions to inquire about their experiences with TracFone's Lifeline program.

TracFone is a wireless reseller and owns no facilities in Wisconsin. In its original order relative to ETC issues, the FCC limited ETC status to carriers using a combination of their own facilities, resale and unbundled network elements: companies without any facilities could not be ETCs.¹ However, the FCC subsequently granted TracFone a waiver of that requirement.² No comments were filed expressing concerns about TracFone's lack of facilities in Wisconsin, and Wisconsin rules regarding ETC status do not include a requirement that the provider own its own facilities.

TracFone offers only pre-paid wireless service. Customers purchase a TracFone instrument initially, and then buy minutes of use as needed. TracFone does not charge monthly rates or fees. When a customer uses all of the previously purchased minutes, the phone cannot be used until the customer buys additional minutes.

Most of the significant issues in this case relate to how TracFone intends to offer Lifeline and LinkUp to low-income eligible customers.³ If it is designated as an ETC, TracFone will be required to provide Lifeline and Link-Up to its customers. In fact, the primary focus of the

¹ Universal Service Report and Order, released May 8, 1997, FCC docket 97-197. Although the ETC concept arises in federal law, the states are responsible for the ETC designation. Consequently, the Commission's USF rules have provisions on ETC matters.

² Order, Petition of TracFone Wireless, Inc., for Forbearance released September 8, 2005, CC Docket 96-45.

³ The state USF administrative rules in Wis. Adm. Code §§ PSC 160.061(1) and PSC 160.062(1) require TracFone to offer Lifeline and Link-up.

applicant in becoming an ETC is to be able to provide Lifeline and Link-Up service to low-income customers, and to be reimbursed for doing so. TracFone has stated that it does not intend to request Lifeline or Link-Up reimbursement from the state USF.

TracFone has stated that it will provide its handset and account activation services without charge to low-income customers. This more than fulfills the requirements of the state Link-Up service, which requires only the waiver of nonrecurring charges.

The Lifeline program provides a monthly discount to eligible low-income customers to make essential telephone service more affordable. TracFone has requested that the requirement that a provider offering Lifeline service provide a monthly discount to all qualified customers, as set forth in Wis. Admin. Code § PSC 160.062(2)(b), not be applied to TracFone. Instead, TracFone wants to provide a monthly discount in the form of free minutes of use to such customers. As a prepaid wireless provider, TracFone does not charge a monthly fee for service, but charges only for minutes of use and those minutes are purchased in advance. TracFone's proposed Lifeline service would provide to eligible low-income customers a monthly amount of free minutes that is comparable in retail value to the monthly Lifeline credit issued by providers with monthly rates. TracFone has proposed providing Lifeline customers with 61 monthly minutes of "free" service (worth \$12.20 at TracFone's retail rates) as a Lifeline credit.

Providing free monthly minutes of service in lieu of a monthly discount is a new approach to Lifeline service. It is an attempt to mesh TracFone's business model with the goals of the Lifeline program, and it appears to do so. The facts that TracFone provides prepaid phone service, that it does not bill customers, and that there are administrative difficulties of TracFone trying to administer Lifeline in the customary way combine to create an unusual situation.

The Commission is authorized under Wis. Admin. Code § PSC 160.01(2)(b),⁴ to adopt different requirements for individual providers in unusual or exceptional circumstances. It is reasonable to adopt this different approach for this provider. The Commission delegates to the Administrator of the Telecommunications Division the authority to approve future revisions of the number of free minutes provided per month, when necessary, due to changes in the prices of telecommunications services or the Lifeline program itself or other factors. It is not reasonable to require a reopening of this docket, nor formal notice and opportunity for comments, when processing such changes.

Wisconsin's Lifeline program rules include a requirement that the Lifeline rate not be less than \$3.00 per month.⁵ Wis. Admin. Code § PSC 160.062(2)(c).⁶ TracFone has requested that this requirement not be applied to TracFone.

TracFone does not charge monthly rates for its phones, only per minute charges. It does not bill customers. TracFone's business plan is predicated on having no monthly fee for Lifeline service, and it argues that having no monthly fee is in the public interest in this particular case. As noted above, the facts that TracFone provides prepaid phone service, does not bill customers, and faces administrative difficulties of trying to administer Lifeline in the customary way combine to create an unusual situation. The Commission is authorized under Wis. Admin. Code § PSC 160.01(2)(b), to adopt different requirements for individual providers in unusual or

⁴ Wis. Admin. Code § PSC 160.01(2)(b) states, "Nothing in this charter shall preclude special and individual consideration being given to exceptional or unusual situations and upon due investigation of the facts and circumstances involved, the adoption of requirements as to individual providers or services that may be lesser, greater, other or different than those provided in this chapter."

⁵ A minimal monthly rate was established as a means to give (even low-income) customers some responsibility for service that would not be there if service were free or close to free.

⁶ Wis. Admin. Code § PSC 160.062(2)(c) states, "Notwithstanding par. (b), in no case shall the Lifeline monthly rate be less than \$3 or more than \$15."

exceptional circumstances. It is reasonable in this circumstance to not require a minimum monthly charge.

The lack of a monthly charge for TracFone service creates a potential problem if a customer loses or abandons a TracFone phone without notifying TracFone. With no monthly bill, the service would not be terminated for non-payment as would happen with more traditional telephone service payment structures. This could result in continuing Lifeline reimbursements to TracFone when no customer is “receiving” the Lifeline benefit. Staff has had extensive discussions with the company about this issue. TracFone stated that it found a requirement for a minimum monthly rate burdensome and in conflict with its business models. Various methods and models for ensuring that Lifeline monies would not be used to reimburse the company for credits provided to accounts which were no longer active were discussed, but no consensus was reached.

To preserve the long-term viability of the federal universal service funds, and to protect the customers served by those funds, the Commission needs to ensure that monies paid out by those funds are not wasted. It needs to ensure that fund payments end up benefitting customers, rather than going to inactive accounts or out-of-service phones. If an account has been abandoned, Lifeline subsidy payments to that account need to cease in a timely manner. It is reasonable to require providers that service the market niche TracFone intends to serve to demonstrate that procedures to ensure this are in place before granting ETC certification. It is also reasonable to require such companies to keep records which can verify that the procedure is being followed.

Staff has identified several methods by which such providers could accomplish that goal. The provider could track usage, and act rapidly to verify whether a customer was still actually a customer whenever usage ceases. The provider could stop applying USF credits to any account that had no usage in a previous month, or take any one of a number of other actions. The Commission does not wish to limit these options at this time, especially for future providers that may offer services similar to those offered by TracFone; therefore, the Commission chooses not to mandate a single approach. Instead, it directs TracFone to explain how it will meet this requirement, and delegates to the Administrator of the Telecommunications Division authority to review, request modifications to and ultimately approve such plans. Future providers will be required to do the same.

The Commission's grant of ETC status to TracFone is conditioned on the company submitting a plan which meets these requirements. The company must file an initial plan within 60 days of the date of this Final Decision. If the company's plan is not acceptable to the Administrator, the company may file revisions or modifications to its plan both before and beyond the 60-day period, but ETC designation will not be effective until such a plan is approved.

TracFone is required to maintain records and data that will allow the Commission to monitor, review, audit or otherwise ensure that the plan approved by the Administrator is being implemented and is effective. The Commission delegates to the Administrator of the Telecommunications Division the authority to determine what such records will contain, and how long they must be retained.

The Commission finds that TracFone meets the requirements for ETC designation. TracFone is a cellular mobile radio reseller. As such, it does not require certification by the Commission. TracFone has agreed to meet all of the requirements for ETC designation with the exception of the pay telephone requirement that is discussed below.

TracFone has requested that the requirement that an ETC provide a pay telephone in each municipality, as set forth in Wis. Admin. Code § PSC 160.13(1)(d), not be applied to TracFone. The Commission is authorized under Wis. Admin. Code §§ PSC 160.01(2) and PSC 165.01(3) to adopt different requirements for individual providers in unusual or exceptional circumstances, as the Commission did in docket 7184-TI-102, in which Midwestern Telecommunications, Inc. (MTI), was designated as an ETC. In that docket, MTI noted that the Commission has a pending rulemaking, docket 1-AC-198, which proposes substantial revisions to that requirement. MTI noted that it would be burdensome to meet the existing requirements and that any pay telephones it provided would be redundant; therefore, MTI requested that the Commission not apply that requirement. MTI stated its willingness to meet the requirement proposed in docket 1-AC-198. The Commission determined, in that docket, that pendency of the rule change and the redundancy of any pay phones MTI would provide created an unusual circumstance. It was therefore reasonable for the Commission to forgo applying the pay phone provision to MTI and to instead adopt a different requirement. MTI and other ETCs since then were required to work with the other providers in their service areas to jointly ensure that pay phones are available. It is reasonable to apply the same alternative requirement to TracFone.

The FCC has determined that an applicant should be designated as an ETC only where such designation serves the public interest, regardless of whether the area where designation is sought is served by a rural or non-rural provider.⁷ The Commission finds that it is in the public interest to designate TracFone as an ETC in the areas for which TracFone requests such designation. The Commission is guided by the factors set forth in Wis. Stat. § 196.03(6) when making a public interest determination. The Commission finds that although there are other ETCs in the areas at issue, designating TracFone as an ETC will nonetheless increase competition in those areas and consequently, will increase consumer choice. The Commission also notes that the prepaid wireless offering, especially TracFone's innovative Lifeline offering, will likely make service available to customers that would not otherwise be served.

In making its public interest determination, the Commission also considers whether cream-skimming is occurring. Since TracFone has requested ETC status for the entire state, the Commission finds no evidence of cream-skimming in this docket.

Order

1. TracFone is granted ETC status statewide, effective once the Administrator of the Telecommunications Division approves the plan described in order point 4.
2. TracFone is an ETC within the meaning of 47 U.S.C. § 214(c), and is eligible to receive federal USF funding pursuant to 47 U.S.C. § 254(2). This Final Decision constitutes the Commission's certification to that effect, subject to order point 1.
3. Within sixty days, TracFone must file a plan describing how it will prevent reimbursement for Lifeline credits being paid to inactive customers or accounts. That plan may

⁷ *In the Matter of Federal-State Joint Board on Universal Service*, 20 F.C.C.R. 6371, 6373, ¶ 3 (2005).

be revised as necessary. The Commission delegates to the Administrator of the Telecommunications Division authority to request modifications in, and to approve, the plan.

4. TracFone shall collect and maintain records necessary to ensure that the company is abiding by the plan described above, and that the plan is effective. The Commission delegates to the Administrator of the Telecommunications Division authority to determine what records may be necessary for such a determination, and to designate how long those records must be maintained.

5. TracFone does not have to meet the requirement under Wis. Admin. Code § PSC 165.088 that it provide a pay telephone in each incorporated municipality, but TracFone is instead required to meet the requirement that it work with other providers in its service territory to jointly ensure that pay telephones are available.

6. TracFone does not have to meet the monetary discount or minimum charge requirements under Wis. Admin. Code § PSC 160.062(2), but TracFone is instead required to provide 61 minutes of free service per month to Lifeline customers. The Commission delegates to the Administrator of the Telecommunications Division authority to approve changes to that number of minutes, and to determine similar minute credits for ETCs with similar waivers of this provision. Changes to the number of minutes may be approved without reopening the docket, issuing a notice or providing opportunity for comment.

7. Jurisdiction is maintained.

Docket 9385-TI-100

8. This Final Decision is effective the date after mailing.

Dated at Madison, Wisconsin, May 20, 2009

By the Commission:


Sandra J. Paske
Secretary to the Commission

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See attached Notice of Rights

PUBLIC SERVICE COMMISSION OF WISCONSIN
610 North Whitney Way
P.O. Box 7854
Madison, Wisconsin 53707-7854

**NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE
TIMES ALLOWED FOR EACH, AND THE IDENTIFICATION OF THE
PARTY TO BE NAMED AS RESPONDENT**

The following notice is served on you as part of the Commission's written decision. This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

PETITION FOR REHEARING

If this decision is an order following a contested case proceeding as defined in Wis. Stat. § 227.01(3), a person aggrieved by the decision has a right to petition the Commission for rehearing within 20 days of mailing of this decision, as provided in Wis. Stat. § 227.49. The mailing date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The petition for rehearing must be filed with the Public Service Commission of Wisconsin and served on the parties. An appeal of this decision may also be taken directly to circuit court through the filing of a petition for judicial review. It is not necessary to first petition for rehearing.

PETITION FOR JUDICIAL REVIEW

A person aggrieved by this decision has a right to petition for judicial review as provided in Wis. Stat. § 227.53. In a contested case, the petition must be filed in circuit court and served upon the Public Service Commission of Wisconsin within 30 days of mailing of this decision if there has been no petition for rehearing. If a timely petition for rehearing has been filed, the petition for judicial review must be filed within 30 days of mailing of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition of the petition for rehearing by operation of law pursuant to Wis. Stat. § 227.49(5), whichever is sooner. If an *untimely* petition for rehearing is filed, the 30-day period to petition for judicial review commences the date the Commission mailed its original decision.⁸ The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

If this decision is an order denying rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not permitted.

Revised: December 17, 2008

⁸ See *State v. Currier*, 2006 WI App 12, 288 Wis. 2d 693, 709 N.W.2d 520.

APPENDIX A

This docket proceeding is not a contested case under Wis. Stat. ch. 227, therefore there are no parties as defined in Wis. Stat. § 227.01(8), to be listed or certified under Wis. Stat. § 227.47. However, the persons listed below are defined by Wis. Admin. Code § PSC 2.02(7), (10), and (12) as parties in the docket and participated therein.

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(Not a party but must be served)
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